TOPICAL INDEX.

	Page
The issue in this case	1
Requirements of the State Commission's order	2
Extent of the control over railroads engaged in interstate commerce taken by Congress in the Act to Regulate Commerce as amended by the Transportation Act of 1920	4
The effect of the order of the California Railroad Commission, if valid, is to oust the Interstate Commerce Commission of jurisdiction over terminal unification vested in it	12
The order of the California Railroad Commission in effect requires the carriers to construct new lines of railroad and to extend and abandon existing lines or portions thereof, in conflict with Paragraph 18 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act	16
The Interstate Commerce Commission has itself construed Paragraph 18 of Section 1 as applicable to union station projects—Cleveland Passenger Terminal Case	21
The order of the California Commission is invalid because its execution and enforcement conflict with the provisions of Section 20a regulating the issue of securities	25
Reserved power of the States	27
Even assuming that the States possess the power to compel carriers subject to the Interstate Commerce Act to construct joint terminals for both interstate and intrastate commerce, the orders of the California Railroad Commission are so arbitrary, unjust and unreasonable as to amount to a taking of private property for public use, without compensation, in violation of the Federal Constitution	31
This is not a grade-crossing case, notwithstanding the effort of the California Railroad Commission to make it one	32
Conclusion	34

AUTHORITIES CITED.

	Page
Atlantic Coast Line v. N. Car. Corp. Com'n, 206 U. S. 1..	34
Boston & Maine v. Hooker, 233 U. S. 97, 118.....	22
Cleveland Passenger Terminal Case, 70 I. C. C., 343, 659	22
Detroit, etc., Ry. Co. v. Boyne City, etc., Ry. Co., 286 Fed. 540	17
Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S. 419	5
New England Divisions Case, 261 U. S. 184.....	34
Oregon R. R. & N. Co. v. Fairchild, 224 U. S. 510, 529..	31
Savage v. Jones, 225 U. S., 501, 533.....	5
Shealy et al. v. Southern Railway (Sup. Ct. So. Car.), (not yet reported)	29
State of Texas v. Eastern Texas R. Co., 258 U. S., 204..	19
Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426	22
Wisconsin R. R. Commission v. C. B. & Q. R. R. Co., 257 U. S. 563	12, 34, 35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 283.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY AND SOUTHERN PACIFIC RAILROAD COMPANY, *Respondents.*

REPLY BRIEF OF RESPONDENTS TO BRIEF FILED AS AMICI CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS ET AL.

THE ISSUE IN THIS CASE.

The issue is not, as stated by counsel for the National Association of Railway and Utilities Commissioners as well as in the briefs for petitioner, whether, since the passage of the Federal Transportation Act, 1920, the power to *require* the construction of union passenger *stations* is now vested in the Interstate Commerce Commission, and the Supreme Court of California did not so hold.

The real issue is whether, since the amendments to the Interstate Commerce Act made by the Transportation Act of 1920, authority to determine the necessity for the consolidation and joint use of terminal facilities by carriers subject to the Act, and to authorize extensions and abandonments, in whole or in part, of lines or the operation thereof, and the necessary capital expenditures to accomplish these purposes, is now vested exclusively in the Interstate Commerce Commission, and whether the States have thereby been divested of jurisdiction and power which they might previously have exercised to accomplish these purposes.

REQUIREMENTS OF THE STATE COMMISSION'S ORDER.

In determining the question whether the order of the State Commission is in contravention of and repugnant to the Constitution and statutes of the United States, it is necessary to consider what this order *expressly* requires the respondents to do, and what respondents are *necessarily* required to do to carry said order into effect.

The first order entered by the Commission was not, as is contended by petitioner at page 4 of their reply brief, "entirely superseded," as in rendering its second order the Commission stated that "all that was said in the former opinion is now considered pertinent and of value herein and the same is therefore approved except as herein modified" (Tr. 136). And the Commission held in rendering its second opinion that its order was based "upon said findings of fact *and the further findings and statements of fact contained in the original opinion in this case and the opinion preceding this order,* * * *" (Tr. 145).

The *express* requirements of the Commission's order are as follows:

> "The Commission finds as a fact that public necessity and convenience demand a unification of passenger terminal facilities in Los Angeles * * *" (Tr., p. 86), and requires "the adoption of a comprehensive plan of transportation development in the territory under consideration in these proceedings * * *" (Tr. 99).
>
> "That defendants * * * do make and construct such additions, *extensions,* and improvements to, and changes in, their railroad facilities in the City of Los Angeles, and do erect a union passenger station and buildings incident thereto in said City of Los Angeles * * *" (Tr. 104).
>
> "Southern Pacific Company shall discontinue the operation of trains on Alameda Street between College Street and 15th Street, inclusive, * * * except for the purpose of local freight switching, which may be carried on during limited hours." (Tr. 150-151.)
>
> "The *unification* of the steam railroad passenger facilities and the construction of a union passenger station, the further development of freight facilities * * *" (Tr. 99).

The order of the Commission *necessarily* requires:

> "The construction of a connecting track between the depot yard of the union passenger station and the proposed site of the coach yard"; the abandonment of the "*main* freight yard of the Southern Pacific"; the construction of a new main freight yard for the Southern Pacific; the abandonment of the less than carload freight station of the Southern Pacific; the establishment of a new less than carload freight station for the Southern Pacific (C. R. C. Exhibit No. 1, page 454).

The joint use of lands, tracks and terminal facilities now owned by respondents of a value determined by the Commission's engineers to be $28,050,691 (C. R. C. Exhibit No. 1, page 498).

The abandonment of the three existing passenger terminals of respondents.

That there must be an extension of lines, abandonment of lines, and joint use of terminal facilities is expressly admitted by petitioners' counsel at pages 17, 18, 21 and 23 of their brief filed in support of their petition for the writ of certiorari.

One of the conclusions reached by the Commission is that "the table (Tr., p. 94) is included in this decision * * * merely to give an indication of the scope of the proposed development * * *" under "the general ultimate development plan to the extent that it is advisable and possible to lay down specifications at this time" (Tr., pp. 94-100). These costs, as shown by said table, range from $25,396,633 to $45,092,104. According to the Commission's statement, the chief engineer of the Commission estimated "the ultimate capital expenditure for all recommendations" at $32,233,445 (Opinion, Tr. 53).

EXTENT OF THE CONTROL OVER RAILROADS ENGAGED IN INTERSTATE COMMERCE TAKEN BY CONGRESS IN THE ACT TO REGULATE COMMERCE AS AMENDED BY THE TRANSPORTATION ACT OF 1920.

The purposes of Congress are to be determined not merely by the express regulations contained in the Act to Regulate Commerce as amended by the Transportation Act of 1920, but by the purposes of said legislation taken as a whole.

"When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."

Savage v. Jones, 225 U. S., 501, 533.
Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S., 419.

This was the method followed by the Supreme Court of California in reaching its conclusion in this case.

In the Transportation Act, Congress has provided for the consolidation by the Interstate Commerce Commission of the railway properties of the continental United States into a limited number of systems to be so arranged that "these systems can employ uniform rates in the movement of competitive traffic and *under efficient management* can earn substantially the same rate of return upon the value of their respective properties." (Sec. 5, par. 4 of Interstate Commerce Act, as so amended.)

Said Act further provides that in the exercise of its power to prescribe just and reasonable rates the Commission "shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and *economical management and reasonable expenditures for maintenance of way, structures and equipment*, earn an aggregate annual net railway oper-

ating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." (Sec. 15a, par. 2.)

And in the next paragraph it is provided that the Commission shall from time to time determine what percentage of such aggregate property value constitutes a fair return thereon, and that in making such determination "*it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation.*" (Sec. 15a, par. 3.)

In the foregoing provisions Congress took control of the railway systems of the country as a whole, provided for their consolidation into a limited number of systems, and emphasized its will that said systems shall be managed in as *economical* a manner as possible, with *reasonable expenditures only* "for maintenance of way, *structures*, and equipment," and provided that in fixing rates the Interstate Commerce Commission shall give due consideration to the transportation needs of the country, and the necessity "under honest, efficient and *economical* management of existing transportation facilities" of *enlarging* such facilities.

For the purpose of insuring the carrying out of these objects Congress proceeds in said Act to provide (Sec. 402, amending Sec. 1 of Act to Regulate Commerce):

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this

Act shall undertake *the extension of its line* of railroad, or *the construction of a new line* of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, *unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line* of railroad, and no carrier by railroad subject to this Act *shall abandon all or any portion of a line* of railroad, or the operation thereof, *unless and until* there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

It is further provided (par. 20) that no other approval of any such construction, operation or abandonment of lines shall be necessary than the certificate of the Commission.

It is also made a misdemeanor, punishable by fine or imprisonment for the carrier, its officers or agents, to violate the provisions of paragraph 18.

The *only limitation* upon this power given the Commission over the construction and extension of new lines and the abandonment of existing lines or any portion thereof is in the following paragraph of the same section:

> "(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, *shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within*

one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

The Transportation Act (Sec. 400) provides that the word "railroad" as used in the Act to Regulate Commerce shall include "all switches, spurs, tracks, *terminals, and terminal facilities of every kind* used or necessary in the transportation of the persons or property designated herein, *including all freight depots, yards, and grounds,* used or necessary in the transportation or delivery of any such property."

By Section 405 the second paragraph of Section 3 of the Interstate Commerce Act is amended so as to read as follows:

"(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, *afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines,* and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"(4) *If the Commission finds it to be in the public interest and to be practicable,* without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, *it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a*

reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and *for such compensation* as the carriers affected may agree upon," etc.

A similar provision authorizing the Commission to require the joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, upon payment of compensation, is also contained in paragraph 15 of section 1 of the Interstate Commerce Act as amended by Section 402 of the Transportation Act, authorizing the Commission to require proper distribution of cars between carriers where the public interest requires it.

The Commission is also authorized to require a carrier "to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, *and to extend its line or lines.* (Par. 21 of Sec. 1.)

A new section (Sec. 20a) is added to the Act, *which forbids any carrier subject to the Act to issue any share of stock or any bond or other evidence of indebtedness, among other things, without authority from the Interstate Commerce Commission.*

The provisions of the Transportation Act above referred to clearly show the purpose of Congress to take such full and complete control over carriers by railroad engaged in interstate commerce, and of their rates, operations, management, etc., including the issuance of new securities, as to preclude the idea that the States may require such carriers to abandon existing terminal stations and facilities which are safe and adequate, or may be made safe and adequate at comparatively small expense, and unite in establish-

ing new and expensive joint depots and other terminal facilities, either to meet the demands of civic pride or the better convenience of the public. If one State can do this, all the States may, with the result that the most extravagant and alarming expenditures might be forced upon the carriers by the States, in the teeth of the declaration by Congress in the Transportation Act that the management of the railroads should be as economical as efficiency and the necessities of the undertaking will permit.

In the case at bar, the record shows that the cost to the three carriers of constructing a union passenger depot on the Plaza site will be from $25,000,000 to $45,000,000, according to the State Commission's own findings. (Tr., p. 94.) The estimate of the Commission's chief engineer was $32,000,000 (Tr., p. 53.)

Charged, as the Interstate Commerce Commission is, with the supervision and control of the carriers, subject to the Act, in the most important particulars, i. e., with the duty of consolidating the carriers into a limited number of systems; with the duty of prescribing rates which will secure a fair return to the carriers based upon their efficient and economical management of their properties; with the allowance of "reasonable expenditures" only "for maintenance of way, structures and equipment"; with the duty of regulating car distribution between the carriers so as to secure adequate transportation service, including the authorization of the joint use of terminals and main tracks leading into the same; with the duty of requiring the carriers to furnish proper facilities for the interchange of traffic between their respective lines; with the sole and exclusive duty of authorizing the construction of any new line or the extension or abandonment of exist-

ing lines, or any portion thereof, with the exception only of such negligible things as spurs, sidetracks, and switches located wholly in one State; with the exclusive power to approve or disapprove the issuance of any capital stock, bonds or other evidence of indebtedness or the assumption of other obligations by the carriers, which large expenditures for betterments and new structures would undoubtedly require; and with the power preserved in the States only to require "just and reasonable freight and passenger service for *intrastate* business," and that only insofar as the State's requirements are not inconsistent with any lawful order of the Commission made under the provisions of this Act—can it be doubted for a moment that *the authorization* for the construction of such gigantic and expensive structures as union terminal stations in large cities necessarily are, with the consequent changes, additions, extensions in existing trackage, structures and yards, and the acquisition of new areas and the construction of new tracks and buildings necessarily required, must come from the Interstate Commerce Commission? If this were not so, would it not lie within the power of the States and the State Railroad Commissions throughout the country—represented here in large numbers, eagerly awaiting the decision of this court—to impose enormous new capital expenditures upon the carriers subject to the Act, *without the approval of the Interstate Commerce Commission,* thus defeating the primary purposes and express provisions of the Act? To hold otherwise is to make the limited power of the States, with respect to *intrastate* freight and passenger service only, preserved in the Transportation Act, of greater effect and importance than the broad and comprehensive

powers over the carriers as instrumentalities of interstate commerce expressly conferred by the Act upon the Interstate Commerce Commission, although in preserving such limited power of the States with respect to *intrastate* commerce Congress was careful to provide that even such power was subordinate to the orders of the Interstate Commerce Commission made pursuant to the provisions of the Act.

In *Wisconsin R. R. Commission* v. *C., B. & Q. R. R. Co.*, 257 U. S., 563, this court reviewed the Transportation Act and held that, although there was no specific grant of power to the Interstate Commerce Commission to deal with State rates, yet the scheme of the Act and the power expressly given to the Commission to prevent undue, unreasonable, and unjust discriminations against interstate or foreign commerce, authorized it to remove such discriminations resulting from unduly low intrastate rates. The same principle of construction is applicable here. Moreover, we think that the order of the California Railroad Commission here in question is in conflict with certain specific provisions of the Transportation Act.

THE EFFECT OF THE ORDER OF THE CALIFORNIA RAILROAD COMMISSION, IF VALID, IS TO OUST THE INTERSTATE COMMERCE COMMISSION OF JURISDICTION OVER TERMINAL UNIFICATION VESTED IN IT.

(a) *Under paragraph 4 of section 3.*

In this paragraph Congress dealt specifically with terminal unification in the Transportation Act by empowering the Interstate Commerce Commission to bring the same about by requiring the use of the terminal facilities of one carrier by another carrier or carriers. Under the uncontradicted evidence and

under the findings of the California Commission the existing passenger terminal facilities of the Southern Pacific at Los Angeles are adequate to accommodate all three respondents for many years to come. It also appears from the evidence that the cost of terminal unification through utilizing the existing Southern Pacific facilities will be immeasurably less than under the plan ordered by the California Commission. Indeed no evidence should be required to demonstrate that the expense of providing a union station by this utilization of an existing station and the yards and facilities appurtenant thereto would be far less than would be necessitated by abandoning existing facilities and constructing new ones.

True no order has been made by the Interstate Commerce Commission requiring the use of Southern Pacific terminals as a union station, but this is immaterial. The effect of the order of the California Commission is to oust the Interstate Commerce Commission of jurisdiction, in an appropriate case, to bring about terminal unification through the use of the existing facilities of the Southern Pacific, even though it might be of the opinion that the public interest would be better served by this plan than by the plan of the California Commission. In point of fact the terminal situation at Los Angeles is now before the Interstate Commerce Commission on complaint brought by the City of Los Angeles. Even though the evidence was conflicting as to relative cost and advantage of the two plans, it would be for the Interstate Commerce Commission to determine the issues thus raised. The effect of this order of the California Commission is therefore to oust the Interstate Commerce Commission, first of a general jurisdiction expressly conferred, and second of a jurisdiction already invoked and dealing with the same subject-matter.

(b) *Under the consolidation provision.*

The consolidation provisions of the Act, already noted, not only require the Interstate Commerce Commission to prepare a complete plan of consolidation of all carriers into a limited number of systems, but prohibit the making of any consolidation except in accordance with that plan. That the plan of consolidation upon which the Commission is now at work necessarily involves a consideration of the terminal problem and of terminal unification at all important cities, and so at Los Angeles, is shown by the following extract from the report of Prof. Ripley, appointed by the Commission to work out a tentative plan of consolidation, and which is annexed as an appendix to the official tentative report of the Commission. (63 I. C. C. pp. 483-484):

> "Another far-reaching assumption is vital to the success of this plan. This has to do with the operation of terminals at great centers. Historically, there has been the greatest diversity of experience in this regard between the carriers of the country. Some roads are peculiarly fortified as to terminals, while possessing weak lines from an operating standpoint across the open country. For others, the reverse is true. Some companies, entering the field late, enjoy good locations as to lines, but have always worked under a handicap at the terminals. * * * To put together railway lines on the map without having constant regard to the possibility of free delivery or receipt at either end would indeed be futile. * * * But whatever the means adopted to this end, it is submitted that a proper adjustment of the various terminal situations, always of course for due compensation, is an important adjunct to any comprehensive consolidation plan. No recommendation,

therefore, as to particular terminal remedies is offered in this report. The subject technically is so involved, that it might well be made matter for a special investigation. Its bearing upon and relation to the subject of the division of through rates is as obvious as is its intimate connection with consolidation. * * * Consolidation can never be effectively brought about without the adoption of a comprehensive policy as to terminal ownership, operation, or both. It is herein assumed that free access will be somehow provided, either under the present emergency powers as contained in Section 1, paragraph 15c, or by the adoption under a consolidation plan of permanent arrangements in all of the important centers. * * * The important point, whatever the means adopted to this end, is that there should be unified operation and entirely free access to all participants alike."

The State is thus driven to the contention that the power to regulate in this important field resides at the same time in the state and in the federal commissions, and that the state may regulate even when the Interstate Commerce Commission is actually at work in the same field. The objections to contemporaneous or even successive regulation of this same subject by the state and federal authorities are obvious. If the other states should exercise their asserted power in like manner as the State of California has done, hundreds of millions of capital expenditures would be imposed upon the railroads the charges for which would burden interstate commerce, and all of which would be wasted except in the improbable contingency of the anticipation by the different states of the arrangements for joint use of terminals afterwards contained in the Commission's final plan of consolidation.

THE ORDER OF THE CALIFORNIA RAILROAD COMMISSION IN EFFECT REQUIRES THE CARRIERS TO CONSTRUCT NEW LINES OF RAILROAD AND TO EXTEND AND ABANDON EXISTING LINES OR PORTIONS THEREOF, IN CONFLICT WITH PARAGRAPH 18 OF SECTION 1 OF THE INTERSTATE COMMERCE ACT, AS AMENDED BY THE TRANSPORTATION ACT.

Paragraph 18 of section 1, quoted above, forbids the construction of new lines of road or the extension or abandonment of existing lines or any portion thereof, "*unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity" permit of such extension.*"

Opposing counsel have suggested certain reasons why this provision was put into the statute, but the language is general and is to be interpreted so as to accomplish the true purposes of Congress as shown by all the provisions of the Act. And one of the principal purposes of the Act, as above pointed out, is to insure the economical and efficient management of the roads under the supervision of the Interstate Commerce Commission as to their capital issues and expenditures.

We cannot agree with counsel that the provisions of paragraph (18) relate exclusively to "extending existing lines into new territory" (Brief p. 6).

The term "railroad" as used in the act includes "*all the road* in use by any common carrier operating a railroad * * * and all switches, spurs, tracks, *terminals* and *terminal facilities of every kind* * * * including all freight depots, yards and grounds * * *."

Reading paragraphs (18) and (22) together it will appear that "the extension of its line of railroad, or the construction of a new line of railroad * * * or the abandonment of all or any portion of a line of railroad * * *" embraces all such extensions and abandonments except "spur, industrial, team, switching or side tracks, located * * * wholly within one state * * *."

This construction is more imperative in cases such as this involving the expenditure of at least $32,000,000.

In *Detroit, etc. Ry. Co. v. Boyne City, etc Ry. Co.*, 286 Fed. 540, the District Court, E. D. Michigan, construed paragraph 18 to apply to 3¾ miles of track which the defendant company, doing an interstate business, proposed to build from a connection with its main line to shale beds owned by a cement company. It appeared that said track was also to be used by the public for loading and shipment of other commodities, and under the laws of the State would be subject to control of the State Public Utilities Commission, which had power to regulate train service thereon, and would also in all probability be later extended to other shale beds and for general purposes. In holding that this new trackage was an "extension" of a line of railroad within the meaning of paragraph 18, and that it was not a "spur" track within the meaning of paragraph 22 of section 1 of the Interstate Commerce Act, the District Court said (*Id.* pp. 547-548):

> "I will not at this time attempt to state a definition of the term 'spur track' which will necessarily be exact and complete in all cases, but in my opinion the distinguishing feature between 'extensions' and 'new lines,' on the one hand, and 'spur, industrial, team, switching or side tracks,'

on the other, as used in this statute, is this: That the former are tracks over which there are to be train movements in the sense that such movements are a part of the actual transportation haul from the shipper to the consignee, while the latter named tracks are for use in loading, reloading, storing, and switching the cars and other things merely incidental to the regular train haul. This track seems to be for the regular train haul in transportation proper rather than those incidental services characteristic of the tracks named as being excepted from the requirements of the act. *Considering all of the facts and circumstances of the present case*, including the proposed operation of entire trains over the proposed track and the main line of defendant in continuous transportation and without switching movements or charges; considering the sidings and public loading stations to be constructed and used in connection with said track; *considering the expense of the proposed undertaking;* considering the competitive character and results of the contemplated use and operation of said track and trains; considering the fact that the proposed track and train service will be between points where the competing railroad now maintains stations and between which the competing railroad now operates a regular train service, and in view of the entire record—I reach the conclusion that such proposed track has the characteristics of, and constitutes, not a 'spur track,' but a new 'line,' more specifically, an extension or a branch line. *Akers v. United N. J. R. & Canal Co.*, 43 N. J. Law, 110; *Illinois Central R. R. Co. v. Sioux Falls Quarry Co.*, 33 S. D. 63, 144 N. W. 724; *Memphis v. St. Louis & San Francisco R. R. Co.*, 183 Fed. 529, 106 C. C. A. 75 (C. C. A. 6).

"As the present line of defendant railroad is engaged in interstate commerce, and as this proposed extension, or branch, would, when com-

> pleted, become a part of such interstate commerce railroad, said branch would thereby itself become a part of interstate commerce. For that reason, *as well as because, even if it were entirely intrastate in character, its 'unremunerative operation would or might burden or cripple the main line* (of the defendant railroad) *and thereby affect its utility for service as an artery of interstate and foreign commerce,* (*State of Texas v. Eastern Texas Railroad Co.*, 258 U. S. 204, 42 Sup. Ct. 281, 66 L. Ed.), I cannot doubt that Congress constitutionally could, *and under the statutory provisions hereinbefore considered did,* make the construction of such track subject to the orders of the Interstate Commerce Commission and dependent upon the issuance by that body of the certificate prescribed in paragraph 18 of section 1 of the Interstate Commerce Act."

In the case at bar not only will a considerable portion of the main line of the Southern Pacific Company have to be "abandoned," but the main lines of all of the three companies concerned will have to be "extended" if they are required to construct a union passenger terminal station on the Plaza site, to say nothing of the enormous expense involved in the construction of such a station and its consequent burden upon interstate commerce.

In the *State of Texas v. Eastern Texas R. Co.*, 258 U. S. 204, this Court held that the Transportation Act of 1920, Sec. 402, pars. 18-20, did not authorize the Interstate Commerce Commission to permit a railroad who owned only one line situated wholly within a single State to abandon its line, so far as intrastate commerce was concerned. In so deciding, the court, speaking by Mr. Justice Van Devanter, said:

> "The road lies entirely within a single state, is owned and operated by a corporation of that state, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce."

This language plainly suggests that if the road in question had been a part of an interstate system and its continued operation might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce, the decision of the court would have been different and the power of the Interstate Commerce Commission over the abandonment of the road for intrastate as well as interstate business upheld. It would seem that this is a clear recognition of the principle for which respondents are here contending, namely, that Congress in the Transportation Act of 1920 has conferred upon the Interstate Commerce Commission full power and authority to pass upon all questions relating to the lines of common carriers engaged in interstate commerce, including a portion located within a single state.

Conversely, the language of the opinion just quoted implies that a State railroad commission would have no power to authorize or require the abandonment of a line of railway located entirely within its limits, which is a material and important part of an interstate system, either as it relates to intrastate business and more

particularly the interstate business of such a carrier, especially where orders, such as were entered in the cases at bar, relate to railways whose lines serve many states, and not only directly interfere with and burden interstate commerce, but would prevent the carriers from transporting a large volume of interstate business.

It is to be noted that Congress has safeguarded the interests of the States, both as to the extension and abandonment of existing lines, and the construction of new lines, by requiring (paragraph 19), notice of any application for any such action by the Interstate Commerce Commission to be given the Governor "of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities." This provision, it will be observed, is a further recognition of the fact that the power of the Interstate Commerce Commission in this regard extends to matters affecting intrastate commerce.

THE INTERSTATE COMMERCE COMMISSION HAS ITSELF CONSTRUED PARAGRAPH 18 OF SECTION 1 AS APPLICABLE TO UNION STATION PROJECTS—CLEVELAND PASSENGER TERMINAL CASE.

In the cases decided by the Interstate Commerce Commission, referred to in the brief under review (p. 7) the Commission held that the relocation of a few tracks of a carrier, because of their minor nature and the fact that the public service and convenience was

not substantially affected thereby, did not come within the scope of paragraph 18. But this is far from saying that this paragraph does not cover such radical changes in the existing trackage, terminals and stations of the three carriers concerned as will be required by the order of the California Railroad Commission here involved.

The Interstate Commerce Commission has itself construed paragraph 18 of section 1 as applying to the construction of new union passenger terminal facilities and of the line extensions necessary to reach the same. (*Cleveland Passenger Terminal Case*, 70 I. C. C., 342, 659.) True the matter of statutory interpretation is not discussed in either the original or supplemental opinion. The assumption of jurisdiction, however, was in itself a practical construction of the Act by the body charged with its administration, and, while not controlling, is entitled to great weight (*Boston & Maine v. Hooker*, 233 U. S. 97, 118; *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426.

That case, like this, involved the creation of a new union passenger terminal and of line extensions within the city, necessary to reach the new terminal, all at a cost of over $60,000,000. In its first opinion the Commission refused to issue a certificate of convenience and necessity, saying (70 I. C. C. 352):

> "Summing the matter up, we are not persuaded by the evidence now before us that the terminal problem has received adequate consideration in the Public Square plan, either from the local or the railroad point of view; that this plan is compatible with the public interest, in its present form; or that we ought, by granting the certificates of public convenience and necessity which are sought, to lend our sanction to the enormous expenditure

of capital which the plan involves. Possibly the presentation of further evidence or the modification of the plan in various particulars might make possible a different conclusion, but it is the conclusion which we are constrained to reach upon the record now before us. It should further be said that dismissal of the pending applications need not involve delay in terminal improvements at Cleveland, for the record makes it clear that the railroads feel that they are so situated financially at the present time that the immediate development of a plan of the scope proposed would not be practicable."

Upon rehearing and after taking of further testimony the Commission in its second opinion authorized the issuance of a certificate of public convenience and necessity, saying (*id.*, 661-2):

> "The proposed plan affords an additional route through Cleveland for the through business of the applicants and provides a separate and independent passenger route from Collinwood on the east to Berea on the west, with the great advantage of completely segregating the passenger movement through the city, thus leaving the full capacity of the lake front tracks and of the Cleveland Short Line available for freight movement only. There is no evidence that any other feasible plan would accomplish a like result. *The prime importance of making such a provision for the future may be deemed sufficient to warrant imposing upon the transportation revenues of the country any reasonable financial burden which the plan may involve. An analysis of the prospective capital charge does not reveal an unreasonable burden on future traffic. Considering the importance of the results to be attained, we cannot say that the expenditures proposed are out of proportion to the*

benefits which interstate commerce will derive therefrom."

If the Commission in that case had adhered to its original opinion denying a certificate of public convenience and necessity because not convinced that the resulting public convenience was sufficiently great to justify the enormous burden of capital charges forever placed upon commerce by this project, is it conceivable that the State Commission of Ohio could have compelled the carriers, by order, to construct the proposed union passenger terminal and incur the expense which the Interstate Commerce Commission had found was not justified?

In the *Cleveland Terminal Case* there was before the Commission a substitute plan presented by the opponents of the carriers. In that case, as in this, therefore, two possible plans were under consideration. Is it conceivable that after the second opinion of the Commission authorizing the issuance of a certificate of public convenience and necessity, the State Commission of Ohio, believing the other plan to be more in the public interest, could have by order required the carriers to establish a union passenger terminal according to the other plan? This case illustrates the resulting conflict of authority if the States retain the powers asserted by the California Commission.

The *Cleveland Case* and this case together likewise illustrate how futile has been the effort of Congress to give the Commission control of large capital expenditures involved in new railroad construction and thereby prevent waste, if paragraph 18 of Section 1 does not apply to the construction of those extensions, new lines and facilities involved in the establishment of a new union station in a great city. Such a project neces-

sarily involves the creation and construction of a new terminal railroad (usually brought about by the formation of a separate company) the length of which may be comparatively short, but the cost of which project, as a whole, runs into the tens of millions and may well equal the cost of a line several hundred miles long.

THE ORDER OF THE CALIFORNIA COMMISSION IS INVALID BECAUSE ITS EXECUTION AND ENFORCEMENT CONFLICT WITH THE PROVISIONS OF SECTION 20a REGULATING THE ISSUE OF SECURITIES.

It is a matter of common knowledge that capital expenditures of upwards of $30,000,000 require financing through security issues over which the Interstate Commerce Commission is given exclusive control. It may be said that the carriers are at perfect liberty to apply to the Interstate Commerce Commission for authority to issue the necessary securities. The order of the California Commission, however, if a valid exercise of State sovereignty, must be capable of enforcement and execution *ex proprio vigore*. If for its execution the sanction of the Interstate Commerce Commission is required, it ceases to be a valid order and becomes a recommendation only. Nor has the State any authority to require a carrier to apply to the Interstate Commerce Commisison for the necessary authority.

Furthermore under paragraph 2 of section 20a the power of the Interstate Commerce Commission to authorize the issuance of securities is thus specifically limited.

> The Commission shall make such order only if it finds that such issue or assumption: (a) is for

> some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

By paragraph 4 every application therefor must be made under oath by an executive officer having knowledge of the facts, and by paragraph 6 notice of all such applications must be given to the Governor of each state in which the applicant carrier operates (not merely the Governor of the state in which the improvements to be financed by such securities are to be made) and state commissions are specifically given the right to appear before the Interstate Commission to make such representations as they may deem just for preserving and conserving the rights and interests of their people and states respectively. Wholly aside from the stultification involved in requiring a railroad officer to submit under oath as necessary and appropriate issuance of securities for purposes which he believes to be neither, the Commission itself is specifically limited to the authorization of securities for purposes which it finds to be necessary or appropriate for or consistent with proper performance of public service and which will not impair its ability to perform that service. If the order of the California Commission is valid then this limitation is rendered void as to all securities which a carrier is required to issue to carry out the orders of a state commission. If the California Commission may require the making of these expenditures it has itself appropriated the power and performed the duty of

determining whether the expenditures are necessary and appropriate, and whether they will increase or impair the ability of the carrier to perform public service, which under section (20a) devolves upon the Interstate Commerce Commission, and the only authority left in that body is to say whether such expenditures, when made, may be financed by the issuance of securities.

The provisions of the act contemplate that the Interstate Commission may receive the views of the state commissions thereon, but decision manifestly rests with the Interstate Commission. Furthermore, in providing that the Governors of all states in which the carrier operates shall be notified as well as the Governor of the state in which the expenditures proposed to be financed by security issues are to be made, Congress manifestly recognized that wasteful expenditures on one section of the carrier's line might impair its ability to perform its public service generally, or that expenditures convenient and appropriate for one section of its line, if made, might impair its ability and its credit so as to prevent other improvements elsewhere which were more necessary. Congress has not, it is true, given the Commission control over capital improvements in a managerial way, but it has through paragraph 18 of section 1 and section 20a evinced a clear purpose to empower the Commission to prevent waste in capital expenditures.

RESERVED POWER OF THE STATES.

What has been said disposes of the argument, also insisted upon in the brief to which this is a reply, based upon the proviso in paragraph 17 "that nothing in this act shall impair or affect the right of a State

in the exercise of its police power to require just and reasonable freight and passenger service for *intrastate* business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

Giving the broadest possible construction to this proviso, how can it be construed to authorize the State to require the three respondent companies, whose business is largely *interstate*, to establish a union passenger terminal at a new location, at an expense estimated by the Commission's own engineers at over $32,000,000 (Tr. 53) and found by the Commission to range from twenty-five to forty-five million dollars? Is such an order a due exercise of the power reserved by said proviso to the States "to require just and reasonable freight and passenger service for *intrastate* business?"

Counsel seems to be contending that this proviso operates to enable the States, under the guise of regulating *intrastate* commerce, to impose practically any burden they see fit upon interstate carriers by railroad within their limits, no matter how seriously it affects the capital expenditures of such carriers and their revenues, unless the State regulations run counter to some express order of the Interstate Commerce Commission. What the proviso, with its qualifying clause, really means is that the State may, in the exercise of their police powers, require just and reasonable freight and passenger service on *intrastate* business, provided the State regulations do not conflict with some lawful order of the Interstate Commerce Commission affecting *that* business. In other words, the proviso recognizes the fact that in the Transportation Act Congress has given the Interstate Commerce Commission power to make regulations and

issue orders which may affect *intrastate* business. *Taken as a whole the proviso is a limitation and not an extension of the State's authority.*

The North Carolina and Oklahoma decisions cited in the brief under review are also based upon a misconception of the purpose and effect of the proviso to said paragraph 17, and the failure of those courts to recognize the full effect of the power of the Interstate Commerce Commission over the matter of terminal facilities growing out of the new and extended powers conferred upon it by the Federal Transportation Act.

It will be noted, on the other hand, as stated on p. 36 of said brief, that the Supreme Court of South Carolina, in *Shealy, et al. v. Southern Railway,* not yet reported, has adopted the view expressed by the Supreme Court of California in the case at bar, and held that since the Transportation Act action by State authorities requiring "capital expenditures" by interstate carriers is "interdicted."

The legislative history of the Transportation Act to which counsel refer in the brief under review merely shows that the framers of said Act thought it advisable to let remain in the States the regulation of interstate railroads as to certain matters, of a local character, which were of minor importance, though considerable, perhaps, in the aggregate, provided, however, that, even as to such matters, the State regulations did not conflict with any lawful orders of the Interstate Commerce Commission. To say that the history of the Transportation Act, or of this proviso, supports the right of the States to compel the carriers to abandon existing terminal stations and construct union terminal stations at the expense of millions and millions of dollars, is in large measure to authorize

the States to defeat the main purposes of the Transportation Act, which were to require that these great instrumentalities of interstate commerce be run as economically as possible consistent with their proper development for the needs of transportation (see language of par. 3 of Sec. 15a), and under the direct supervision and control, as to their capital expenditures, of the Interstate Commerce Commission.

The motions to advance on file herein disclose that subsequent to the granting of the petition for writ of certiorari and the issuance of the writs, the City of Los Angeles instituted a proceeding before the Interstate Commerce Commission relating to the identical matter covered by the orders entered by the State Commission. Thereafter the Interstate Commerce Commission conducted an investigation at which the entire transcript before the California Commission was introduced in evidence and the hearing was concluded.

In the event counsel's construction of the proviso is correct, it would result in the absurd conclusion that in the event the Interstate Commerce Commission should conclude to deny the petition in the case pending before it upon the ground that if the carriers were obliged to incur the expense of consolidating their facilities and erecting a union depot in the manner ordered by the State Commission, the expense involved therein would impair the ability of the respondents to perform their duty to the public, the State Commission could then enforce their orders because they were not "inconsistent with any lawful order of the (Interstate Commerce) Commission made under the provisions of this (Interstate Commerce) act."

EVEN ASSUMING THAT THE STATES POSSESS THE POWER TO COMPEL CARRIERS SUBJECT TO THE INTERSTATE COMMERCE ACT TO CONSTRUCT JOINT TERMINALS FOR BOTH INTERSTATE AND INTRASTATE COMMERCE, THE ORDER OF THE CALIFORNIA RAILROAD COMMISSION IS SO ARBITRARY, UNJUST AND UNREASONABLE AS TO AMOUNT TO A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE, WITHOUT COMPENSATION, IN VIOLATION OF THE FEDERAL CONSTITUTION.

In any aspect of the matter, whatever power the State Railroad Commission may possess over the construction of railroad terminals, and especially union terminals, its exercise of such power must pass the scrutiny of the courts, *and particularly of this court*, as to its reasonableness.

> *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 529.

The reasonableness of the order of the California Railroad Commission involved in this case is therefore a Federal question open to review by this court.

In the case just cited this court held that even where the order of a State railroad commission "involves the use of property needed in the discharge of those duties which the carrier is bound to perform," "the matter of expense is 'an important criteria to be taken into view in determining the reasonableness of the order,'" *and that where "the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling impirtance."* (*Id.*, 529.)

Can the establishment of a union terminal be said to be one of the *absolute* duties of common carriers? Is there any imperative duty resting upon two or more such carriers to abandon existing railroad terminal facilities, which are adequate or can easily be made adequate for the needs of their respective businesses, and so far as the Southern Pacific and Santa Fe are concerned are adequate to accommodate the entire traffic of all three lines, in order to establish, at enormous expense, a union terminal somewhere else to gratify the civic pride of a city?

THIS IS NOT A GRADE CROSSING CASE, NOTWITHSTANDING THE EFFORT OF THE CALIFORNIA RAILROAD COMMISSION TO MAKE IT ONE.

This fact distinguishes this case from *Erie R. R. Co. v. Board of Public Utility Commissioners*, 254 U. S. 394, and *Denver & Rio Grande R. Co. v. Denver*, 250 U. S. 242.

An examination of the orders of the California Railroad Commission under review show that it has been carefully framed with a view to make it appear that the construction of a union passenger station on the Plaza site is indispensable to the proper elimination of dangerous railroad grade crossings in the city of Los Angeles. (See Findings and Order of Commission, Tr. p. 142, *et seq.*)

This was done because the Commission recognized that the only authority conferred by the Legislature of the State upon it upon which it could possibly base such an order was that contained in Section 43 of the Public Utilities Act of the State authorizing the Com-

mission "to make orders binding upon the railroad companies under its supervision, to abolish grade crossings of the public streets of a city and to order a separation of grades so that the railroad and street shall not be upon the same level. (*Civic Center Ass'n. v. Railroad Commission,* 175 Cal. 441, cited at p. 41 of Transcript in this case.)

In overruling the orders of the Commission, the Supreme Court of California said (Tr. p. 233) that—

> "We can perceive no indispensable relation between the elimination of grade crossings and the establishment of union depot facilities, nor can we see any insurmountable difficulty why jurisdiction over the matter of eliminating grade crossings may not be exercised in a proper case consistently, and it may be concurrently, with the exercise of the authority which is vested by the Act of Congress of 1920 in the Interstate Commerce Commission over the subject of union terminal depot facilities."

This view is supported by the evidence upon which the Commission chiefly relied for its findings and order in these cases, namely, the "Report on Railroad Grade Crossings Elimination and Passenger and Freight Terminals in Los Angeles," by Richard Sackse, chief engineer of said Commission, dated July 31, 1919, referred to in the Record as Commission's Exhibit No. 1 (Tr. 46). In said report the chief engineer of the Commission said (Opinion, Tr. 49):

> "We have found *three sites adapted to the location of such a station,* viz: The Plaza site, the Santa Fe station site, and the Southern Pacific station site."

Manifestly, therefore, the establishment of a union passenger terminal on the Plaza site was not necessary to the proper elimination of dangerous crossings on the Santa Fe and Southern Pacific lines.

The establishment of a union passenger terminal in Los Angeles not being necessary for the due protection of the public, the order of the California Railroad Commission here in question cannot, in any view of the case, be regarded as a proper exercise of the police power of the State, but amounts to an attempt to appropriate the property rights of the carriers concerned for the benefit of the people of the State, without compensation, and is void under both the Federal and the State Constitutions.

As held in *Atlantic Coast Line v. N. Car. Corp. Com'n.*, 206 U. S. 1 (headnote):

> "The public power to regulate railroads and the private right of ownership of such property coexist and do not the one destroy the other; and where the power to regulate is so arbitrarily exercised as to infringe the rights of ownership the exertion is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment."

CONCLUSION.

In conclusion we submit that the construction of the Transportation Act of 1920 sought to be maintained by the petitioner and other State Railroad Commissions would defeat the purposes of that Act as it has been interpreted in recent decisions of this court.

Wisconsin R. R. Comm. v. C. B. & Q. R. R. Co., 257 U. S. 563.
New England Divisions Case, 261 U. S. 184.

Those decisions hold that Congress, in the exercise of its indisputable constitutional authority, has taken such full control of "its interstate commerce system" as to render it impossible for the States, in the exercise of any police power that they may possess with respect to *intrastate* commerce, to embarrass the operations of the Interstate Commerce Commission in carrying out the purposes of Congress to provide an adequate transportation system for the country, to be efficiently and economically operated and developed under the supervision and control of the Commission.

In its opinion in the Wisconsin Railroad Commission case the court said (257 U. S. p. 589):

> "Counsel for the appellants have not contested the constitutional validity of the statute construed as we have construed it, although the counsel for the state commissions whom we permitted to file briefs as *amici curiae* have done so. The principles laid down by this court in the *Minnesota Rate Cases*, 230 U. S. 352, 432, 433, the *Shreveport Case*, 234 U. S. 342, 351, and the *Illinois Central Case*, 245 U. S. 493, 506, which are rates cases, and in the analogous cases of *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Ry. Co. v. United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases*, 223 U. S. 1, 48, 51, we think, leave no room for discussion on this point. Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonably compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business rea-

sonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. *Wilson v. Shaw*, 204 U. S. 24; *Luxton v. North River Bridge Co.*, 153 U. S. 525; *California v. Central Pacific R. R. Co.*, 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

Respectfully submitted,

WM. F. HERRIN,
FRANK C. CLEARY,
C. W. DURBROW,
Attorneys for Respondents,
Southern Pacific Company and
Southern Pacific Railroad Company.

J. P. BLAIR,
F. H. WOOD,
WM. R. HARR,
Of Counsel.